ATTORNEY'S SALE OF RIGHT TO USE NAME GROUND FOR DISCIPLINE.

That an attorney has no right to sell the use of his name as such, and that such action constitutes professional misconduct calling for the discipline of the court is the result of a recent decision of the Appellate Division of the New York Supreme Court in the case of *In re Rothschild* reported in the *New York Law Journal,* Vol. XLIV, No. 41. The respondent in this case gave a furniture company a power of attorney to sign his name without limitation to threatening letters to creditors and thus hasten their collection. In view of the fact that the present instance was the first in which the court had been called to pass upon such an offence, the guilty attorney's punishment was fixed at suspension from active practice for one year.

There is no doubt, inasmuch as attorneys are but officers of the court, as has been universally decided by the courts of this country in a vast number of cases, among which are the leading cases of *Ex parte Garland,* 4 Wall. (U. S.), 333, and *In re Cooper,* 22 N. Y., 67, that professional misconduct or neglect of duty as an attorney is good ground for suspension or disbarment. Such is the general doctrine as laid down in *In re Kirby,* 84 Fed., 606, and in *New York Bank v. Stryker,* 1 Wheeler Crim. Cases (N. Y.), 330.

In the case of *In re Kirby, supra,* one Kirby was convicted of having in his possession certain governmental stamps which he knew to be stolen. Although this act was not a felony, Congress had attached to it an infamous punishment. The court in passing judgment, quoting from *Ex parte Wall,* 107 U. S., 265, 273, said:

"It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients and to punish them by fine and imprisonment for misconduct and contempt and, in gross cases of misconduct, to strike their names from the roll."

So in the case of the *New York Bank v. Stryker, supra,* where the respondent was convicted of fraudulently issuing a check, it was said:

"If an attorney, solicitor or counsellor acts wrongfully or dishonestly in his office as such, he is answerable, and may be punished by the loss of his office."

But the question naturally arises: When is an attorney guilty of professional misconduct?

In the majority of the states of the country, statutes have been passed defining what constitutes such professional misconduct as will warrant the court in acting. But whether these statutes conclude the court from exercising its general power and thus punishing guilty attorneys for other than statutory causes is a mooted question, to which the weight of authority in this country is opposed. Such is the ruling in *Ex parte Wall, supra,* and *In re Boone,* 83 Fed., 944.

In the former case, one Wall was convicted of engaging in an unlawful and riotous gathering, which broke into the county jail in Hillsborough County, Florida, took therefrom, by force, a prisoner and hanged him to a tree nearby. The United States Supreme Court decided that this was sufficient cause for disbarment in as much as the defendant thereby, showed such an utter disregard and contempt for the law, which as a sworn attorney he was bound to support, as to totally unfit him for his position, and this, despite the fact that there was no positive statute calling for the exercise of the court's jurisdiction.

And likewise, the Federal Court in the case of *In re Boone, supra,* held that its right to discipline the attorneys practicing in its court remained unabridged by any statute.

But there is some authority opposed to this doctrine, the courts of Indiana and North Dakota holding that the right of disbarment is governed exclusively by statute. Thus, in the case of *Ex parte Smith,* 28 Ind., 47, where the defendant was found guilty of contempt of court, it was held that he could only be disbarred from practice by proceedings, which were regulated by statute, and not by any summary process of the court.

An even stricter rule was laid down and adhered to by the North Dakota courts in the case of *In re Eaton,* 4 N. D., 514, in which it was held that, where a statute enumerates grounds for

the disbarment of an attorney, no other grounds can be considered by the court. In this case, one Eaton made a false statement to another attorney in the presence of the court; he also innocently carried away a paper from the files of the court and destroyed it. In as much as there was no express provision in the statute of disbarment covering these acts, the court held that it could not act.

The New York Court, however, in the principal case, has shown no hesitancy in accepting the doctrine of the United States Supreme and Circuit Courts and holds that it has jurisdiction in such cases even without an award of jurisdiction by a positive statutory enactment. And in as much as the attorneys are but officers of the court, it seems no more than just that the courts should be allowed to regulate the actions of their officers.

Arthur Rothschild, the respondent in this case, executed a power of attorney to the Empire Furniture Co., allowing two employees of that company to use his name, unrestrained, upon all matters pertaining to the collection of the furniture company's outstanding bills. This power of attorney was for one year and in return for the use of his name, the respondent received one hundred dollars worth of furniture.

Justice Ingraham, in rendering the judgment, suspending the attorney for one year, said:

"We think it inconsistent with the performance of the duties assumed by an attorney when he accepts his office, to sell the right to use his name as an attorney; and to enter any arrangement by which others, who are not directly connected in business with him as partners or clerks are authorized to sign letters in his name or to use his name in the transaction of their business, is a serious violation of an attorney's duty to the State and is serious professional misconduct."

However, after considering the opinion of Judge Ingraham, there seems to be no debatable ground upon which the decision can be attacked. The attorney receives his title as such only because he is possessed of special mental attainments peculiar to the law, and these, it is expected, will be upheld by him while in practice. They cannot be upheld by an unprofessional appointee of his and any attempt on his part to vest these appointees with the power, which is coincident to his title, is certainly without the

spirit of good faith, which the members of the bar were justified in expecting of the respondent when they admitted him to practice.

THE ADMISSIBILITY IN EVIDENCE OF PRIVILEGED COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

The defendant in *People v. Dunnigan,* 128 N. E., 180 (Mich.), was convicted of murder. The record discloses the fact that while defendant was in custody charged with some petty offense, one W. was admitted to his cell and in the course of a conversation, sugested that if the defendant wished to communicate with his wife that he, W., would deliver the message. Thereupon the defendant addressed a letter to his wife in which he used language that was construed as a confession of guilt in committing the homicide. W., instead of delivering the letter to the defendant's wife, surrendered it to the sheriff, who used it in evidence against the defendant. It was held that such a self-incriminating letter written by accused and sent to his wife, but not received by her, being intercepted by the sheriff, is not privileged within the statute which prohibits examination of spouses respecting communications between them.

Mr. Wigmore, in his treatise on Evidence, says, that the history of the privilege of communication between husband and wife is involved in a tantalizing obscurity. It was understood to exist in some shape before the end of the sixteenth century, and was firmly established by the latter part of the seventeenth century. So this principle, hitherto existing rather in principle than in rule, practically begins its existence and is defined in terms by the legislation of that period. *Wigmore on Evidence,* Sec. 2333. The earliest reported case in point is *Lady Ivy's Case,* 10 How. St. R., 555 (1684), which held that a husband will not be permitted to testify to communications from his wife.

It is difficult to distinguish the development of the privileged communication rule as to husband and wife, from that of the rule of the disqualification of either spouse as a witness. The earliest mention of the latter rule is found in an *Anonymous Case,* 1 B. & G., 47 (1651), which held that a wife would not be permitted to testify against her husband. The court said in